173046

SOUTH CAROLINA
PUBLIC SERVICE COMMISSION
DOCKET NO. 2004-316-C

In the Matter of	)
	)
Petition of BellSouth Telecommunications Inc.,	)
To Establish Generic Docket to Consider	)
Amendments to Interconnection Agreements	)
Resulting From Changes of Law	)

ITC^DELTACOM COMMUNICATION INC.'S BRIEF

ITC^DeltaCom Communication, Inc.'s ("DeltaCom"), on behalf of itself and its affiliate, Business Telecom, Inc., ("BTI"), respectfully submits this Brief in accordance with Order 2005-105 dated March 3, 2005 and requests that the South Carolina Public Service Commission ("Commission") expand the relief sought in NuVox, KMC, and Expedius' motion to include UNE-P and unbundled network elements ("UNEs").

DeltaCom and BTI are certificated Competitive Local Exchange Providers ("CLEC") of local exchange and exchange access services in South Carolina. DeltaCom and BTI are parties to executed interconnection agreements with BellSouth which have been approved by this Commission.

BellSouth has indicated intent, beginning on April 17, 2005, to unilaterally and unlawfully implement certain UNE determinations made by the FCC in its Triennial Review Remand Order[1] (the "TRRO"). This pending action by BellSouth is directly contrary to both the contractual obligations undertaken by BellSouth

[1] *FCC WC Docket No. 04-313 Unbundled Access to Network Elements,* CC Docket No. 01-338 Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order On Remand Adopted December 15, 2004 and Released February 4, 2005.

(and approved by this Commission) in BellSouth's interconnection agreements and BellSouth's prior commitments to abide by the procedures established under the change of law provisions of those agreements. If BellSouth carries out its threat to quit processing UNE orders on April 17, 2005, substantial harm will accrue to CLECs, like DeltaCom and BTI, that are interconnected with BellSouth and to customers served by those CLPs. DeltaCom requests that the Commission order BellSouth to comply with the law and its signed, Commission-approved interconnection agreements by continuing to accept and process orders for all UNEs in accordance with the terms of such agreements until such time as the parties to those agreements have exercised and fully implemented the change of law provisions contained in those agreements.

NuVox's motion sufficiently describes the factual background of this case and makes a compelling legal argument for the relief requested. Notably, the latest data indicates that 71% of the lines served by CLECs in South Carolina are served via UNE-P. BellSouth indicated that beginning March 11, 2005 (now April 17, 2005) it will no longer accept orders for any services for which it believes the FCC has made a non-impairment determination. Accordingly, the relief granted by this Commission in response to the motions filed by Nuvox and other CLECs should cover all elements impacted by the TRRO including UNE-P as well as high capacity loops and transport.

In a carrier notification posted on BellSouth's web site February 11, 2005 and revised on February 25, 2005, and again revised in the evening of March 7, 2005, BellSouth initially indicated it would determine where UNEs met or did not

meet the FCC's standard and effective March 11, 2005, would reject any UNE orders it did not believe were required unless the ordering party certified their requirement.[2] BellSouth had established March 11, as the cut off date for new orders. Subsequently in a later carrier notice BellSouth extended the cut-off date to April 17. BellSouth stated in the carrier notice that the date had been extended to allow state commissions time to review the petitions filed by CLEC's. Importantly, by its extension BellSouth has acknowledged the public interests necessity for state commissions to review BellSouth's proposed action and take whatever action they feel is necessary to protect the interest of consumers and the industry.

The February 11, 2005, BellSouth Notice specifically stated that BellSouth would reject orders for UNE-P, certain high capacity UNE loops, including copper loops capable of providing high bit rate digital subscriber line services as well as DS1, DS3, and dark fiber inter-office transport as elements of unbundled elements. BellSouth's letter did not indicate that this would apply only if contracts contained a self- effectuating change of law provision. Nor did it cite any provision in the TRRO that would support BellSouth's unilateral attempt to ignore the change of law provisions in its existing interconnection agreements. On February 21, 2005, DeltaCom responded to BellSouth's carrier notice letter and a copy was filed with this Commission in this docket. BellSouth responded to DeltaCom's letter on February 25, 2005, and continues to assert its baseless claim that it can cease to process orders without amending the interconnection

[2] See Exhibit A, Carrier Notification from Jerry Hendrix ("BellSouth Notice").

agreement. BellSouth's response is attached as Exhibit B. On March 7, 2005, BellSouth issued yet another Carrier Notice letter indicating that it will not act unilaterally on March 11, 2005 and cease processing orders but asserts that it will seek the state commission to set a rate equal to resale or a commercial rate. DeltaCom agrees with BellSouth that the rate for local switching and high capacity loops and transport provided under Section 271 of the Act should be set by the state commission and should be subject to the review and approval of the state commission. DeltaCom does not agree that the appropriate just and reasonable rate is the resale rate or the rates unilaterally set by BellSouth in its commercial agreements. However, that is an issue for this Commission to decide in the change of law docket after hearing the arguments by all parties. Finally, BellSouth describes those CLECs that are legally asserting their rights under their contracts as "dilatory". DeltaCom and BTI strongly object to such characterization. As evidenced by the emails attached to DeltaCom's letter to BellSouth filed with this Commission, DeltaCom reached out to BellSouth prior to the TRRO even becoming effective. Additionally, any conversations or communications regarding commercial negotiations are subject to a non-disclosure agreement. It is patently untrue that DeltaCom has been "dilatory" or has in anyway failed to negotiate with BellSouth toward a commercially reasonable solution.

BellSouth's unlawful attempt to self-implement its interpretation of the TRRO in contravention of the change of law provisions in its interconnection

agreements is not limited to South Carolina and is the subject of numerous petitions for relief before other state commissions.

For example, the Georgia Public Service Commission recently approved its staff recommendation rejecting BellSouth's efforts to unilaterally modify UNE terms and CLP interconnection agreements.[3] The legal analysis laid out in that recommendation speaks for itself and is fully applicable in this proceeding. A copy of the Georgia Public Service Commission Staffs recommendation is attached as Exhibit C to this filing. The circumstances in South Carolina are no different. BellSouth's unilateral action is contrary to the public interest and a violation of law and the interconnection agreement executed by BellSouth and DeltaCom and approved by this Commission. DeltaCom adopted the AT&T/BellSouth Interconnection Agreement and the language set forth below provides for the same change of law process. Section 9.3 of the DeltaCom/BellSouth Interconnection Agreement.

> In the event that any final legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of AT&T or BellSouth to perform any material terms of this Agreement, AT&T or BellSouth may, on ninety (90) days' written notice (delivered not later than ninety (90) days following the date on which such action has become legally binding and has otherwise become final) require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the dispute shall follow the dispute resolution procedures set forth in Section 16 of the General Terms and Conditions of this Agreement.

[3] Ga. Docket 19341-U Staff Recommendation R-1. No formal order has been issued, however, DeltaCom has been informed by Georgia Public Service Commission staff that its recommendation has been approved by the Commission.

Section 1.9 of the Interconnection Agreement between BellSouth and DeltaCom states:

> This Agreement may be amended from time to time as mutually agreed in writing between the Parties. The Parties agree that neither Party will take any action to proceed, nor shall either have any obligation to proceed on a requested change unless and until a modification to this Agreement is signed by authorized representatives of each Party.

Section 24.6.1 provides as follows:

> The validity of this Agreement, the construction and enforcement of its terms, and the interpretation of the rights and duties of the Parties shall be governed by the laws of the State of Georgia other than as to conflicts of laws, except insofar as federal law may control any aspect of this Agreement, in which case federal law shall govern such aspect. The Parties submit to personal jurisdiction in Atlanta, Georgia, and waive any objections to a Georgia venue.

Therefore, absent the agreement of DeltaCom or a resolution resulting from the dispute procedures of the interconnection agreement, BellSouth cannot modify the terms of the parties' interconnection agreement, unless a lawful regulatory or legislative action expressly overrides those provisions. In this case, no such regulatory or legislative action exists. Indeed, given the Georgia Commission's ruling, DeltaCom respectfully submits that the Georgia Commission's ruling is binding on the parties in South Carolina pursuant to Section 24.6.1. with respect to the DeltaCom/BellSouth agreement. However, BTI's language is as follows:

> 14.2 No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties.
>
> 14.3 In the event that any effective legislative, regulatory, judicial or other legal action creates a need for rates, terms or conditions to be added to this Agreement, or materially affects any material rates, terms, or conditions of this Agreement, or the ability of BTI or BellSouth to perform any material terms of this Agreement, BTI or BellSouth may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in this Agreement.

With respect to the BTI/BellSouth agreement, the parties must also negotiate any changes of law and those changes can only be effectuated through an amendment to the agreement. The Governing Law provision (Section 19 of the BTI/BellSouth agreement) differs from DeltaCom's in that South Carolina law would govern the agreement:

> Where applicable, this Agreement shall be governed by, and construed in accordance with federal and state substantive telecommunications law, including the regulations of the FCC and appropriate Commissions. In all other respects, this Agreement shall be governed by and construed and enforced in accordance with, the laws of the State in which it is to be performed, without regard to its conflict of laws principles.

In the TRRO, the FCC issued a ruling altering BellSouth's prospective substantive obligations to provide certain UNEs. This ruling, however, did not purport to alter the contract rights of parties to existing interconnection

agreements. Nor could it have done so without an express determination that such contract alterations were required by an over-riding public interest.[4] Nowhere in the TRRO does the FCC indicate that modifications to interconnection agreements should be self-effectuating. In fact, it specifically directs the parties to incorporate the rulings of the TRRO into their agreements through negotiation:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

(TRRO § 233, footnotes omitted).

Thus, the FCC expressly contemplated that contractual provisions like the ones contained in DeltaCom and BTI's agreements with BellSouth would be utilized to implement the terms of the order.

The foregoing, and indisputable, interpretation of the applicability and operation of the Parties' change of law provision is exactly the interpretation adopted by BellSouth when it works to BellSouth's benefit. BellSouth has

[4] United Gas Pipeline Company v. Mobile Gas Service Corp., 350 U.S. 332 (1956); Federal Power Commission v. Sierra Pacific Power Corp., 350 U.S. 348 (1956) ("Mobile-Sierra").

consistently required CLECs to proceed through a negotiation and amendment process pursuant to their interconnection agreements to implement any change in law, no matter the wording used by the regulatory body. For example, BellSouth has done this when the FCC required commingling. BellSouth will not provide commingling absent an amendment even though commingling is an absolute necessity if certain circuits are deemed no longer subject to Section 251. However, in the case of the TRRO, where BellSouth believes it has benefited from a regulatory decision, it has reversed its approach without regard for the law, the plain terms of its interconnection agreements or the impact on competition, or the consuming public.

BellSouth's approach fails to grasp or address the full scope or complexity of the FCC's TRRO. Any change to the operation of the interconnection agreement must include conversion language that may or may not currently exist. There are also a number of other issues that should be addressed such as shared collocation space and business rules that allow combining UNEs with tariffed services and ordering UNEs to facilities owned by another carrier. Simply eliminating UNEs will not fully implement the TRRO. CLECs must have reasonable and contemporaneous access to the alternatives that led the FCC to its non-impairment finding.

These issues are precisely why the carriers include change of law provisions in their interconnection agreements and why they structure the process to allow time for negotiation and include a dispute resolution provision. Invoking change of law provides the parties with an opportunity to fully consider

all of the issues raised by a change in law or regulation and to implement an appropriate, well thought out amendment addressing those changes. BellSouth's threatened unilateral action will address the full compliment of these issues.

Unilateral BellSouth action will not only harm CLECs, it will harm South Carolina customers as well. UNE- P provides the clearest example of such harm. In the case of an existing customer served by a UNE-P line, if that customer wants to make any changes to their line, they are unable to do so unless and until their CLEC signs a commercial agreement with BellSouth. If the customer needs an additional line, new features, or modifications to a hunt group, they can either do without or bear a cost increase when their provider converts the entire location to resale or some other arrangement.

Accordingly, the TRRO, DeltaCom and BTI's interconnection agreements with BellSouth, the breadth of operational issues associated with implementing the UNE changes addressed by the TRRO and the public interest all compel this Commission to promptly act to require BellSouth to preserve the status quo and seek any changes through the change of law process agreed by the parties and approved by this Commission.

WHEREFORE, ITC^DeltaCom Communications, Inc., and Business Telecom, Inc. respectfully request that on or before April 17, 2005 the Commission:

1. Order BellSouth to continue accepting and processing CLEC orders for all UNEs under the rates, terms, and conditions of their approved interconnection agreements; and

2. Order BellSouth to comply with the change of law provisions of DeltaCom and BTI and BellSouth's Commission approved interconnection agreement with regard to the implementation of the TRRO.

3. Find that the Georgia Commission Order is binding with respect to the DeltaCom/BellSouth Interconnection Agreement.

This the 8th day of March, 2005.

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By: _____

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Columbia, South Carolina
March 8, 2005

EXHIBIT A

BELLSOUTH

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Patrick W. Turner
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February 14, 2005

Mr. Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: Re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes of Law
Docket No. 2004-316-C

Dear Mr. Terreni:

Enclosed for filing are the original and ten copies of a Notice of Submission in the above-referenced matter. By copy of this letter, BellSouth is serving this Notice on all parties of record to this docket.

Sincerely,

Patrick Turner

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record

PC Docs #572182

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In Re:	)	
	)	Docket No. 2004-316-C
Petition to Establish Generic Docket to	)	
Consider Amendments to Interconnection	)	
Agreements Resulting From Changes of Law	)	
	)	

NOTICE OF SUBMISSION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully notifies the Public Service Commission of South Carolina and the parties to this docket of the attached letter submitted to the Chief Clerk of the Commission.

Respectfully submitted this the 14th day of February, 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.

Patrick Turner

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PC Docs # 572155

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February 14, 2005

Mr. Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: FCC's *Triennial Review Remand Order*

Dear Mr. Terreni:

On February 4, 2005, the Federal Communications Commission ("FCC") released its permanent unbundling rules in its *Triennial Review Remand Order* ("*TRRO*").[1] As discussed in the attached Carrier Notification Letter that BellSouth posted on its website on the afternoon of February 11, 2005, the FCC identified a number of former unbundled network elements ("UNEs") that will no longer be available as of March 11, 2005, except as provided in the *TRRO*. The FCC adopted transition plans to move the embedded base of former UNEs to alternate serving arrangements and provided that the transition period for the former UNEs (loops, transport, and switching) would commence on March 11, 2005. The FCC made clear its intent for carriers to include the transition plans regarding the embedded base in existing interconnection agreements through appropriate change of law provisions and provided for a true-up of rates back to the effective date of the *TRRO* to reflect price increases that were approved by the FCC.

With regard to each of the former UNEs, however, the FCC provided that no "new adds" would be allowed as of March 11, 2005. *See TRRO* at ¶227. The *TRRO's* provisions as to "new adds" constitute a generic self-effectuating change for all interconnection agreements, and they are effective March 11, 2005, without the necessity

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1 In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313 and CC Docket No. 01-338, *Order on Remand*, FCC 04-290 (released February 4, 2005) ("*TRRO*") (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-290A1.pdf).

of formal amendments to any existing interconnection agreements. See Attached Letter at p.2.

In accordance with the terms of the *TRRO*, and as set out in more detail in the attached letter, BellSouth has informed its carrier customers that, effective March 11, 2005, BellSouth will no longer accept orders that treat the affected items as UNEs. BellSouth has further informed those customers that, as of March 11, 2005, it is no longer required to provide high capacity UNE loops in certain central offices, to provide UNE transport between certain central offices, or to provide new UNE dark fiber loops or UNE entrance facilities.

At the same time we are delivering this letter, we are also filing a copy of this letter and its attachment in Docket No. 2004-316-C and serving a copy of that filing on all parties to that docket.

Sincerely,

Cindy Cox

572068

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085039

Date: February 11, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – Triennial Review Remand Order (TRRO) - Unbundling Rules

On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO).

The TRRO has identified a number of former unbundled network elements ("UNEs") that will no longer be available as of March 11, 2005, except as provided in the TRRO. These former UNEs include all switching[1], as well as certain high capacity loops in specified central offices[2], and dedicated transport between a number of central offices having certain characteristics,[3] as well as dark fiber[4] and entrance facilities[5].

The FCC, recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers (ILEC), adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[6] The FCC provided that the transition period for each of these former UNEs (loops, transport and switching), would commence on March 11, 2005.[7] The FCC made provisions to include these transition plans in existing interconnection agreements through the appropriate change of law provisions. It also provided that rates for these former UNEs during the transition period would be trued up back to the effective date of the TRRO to reflect the increases in the prices of those former UNEs that were approved by the FCC in the TRRO.

The FCC took a different direction with regard to the issue of "new adds" involving these former UNEs. With regard to each of the former UNEs the FCC identified, the FCC provided that no "new adds" would be allowed as of March 11, 2005, the effective date of the TRRO. For instance, with regard to switching, the FCC said, "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[8] The FCC also said "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order." (footnote omitted)[9]

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[1] TRRO, ¶199
[2] TRRO, ¶¶174 (DS3 loops), 178 (DS1 loops)
[3] TRRO, ¶¶126 (DS1 transport), 129 (DS3 transport),
[4] TRRO, ¶¶133 (dark fiber transport), 182 (dark fiber loops)
[5] TRRO, ¶141
[6] TRRO, ¶¶142 (transport), 195 (loops), 226 (switching)
[7] TRRO, ¶¶143 (transport), 196 (loops) 227 (switching)
[8] TRRO, ¶199
[9] TRRO, ¶227

The FCC clearly intended the provisions of the TRRO related to "new adds" to be self-effectuating. First, the FCC specifically stated that "Given the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005.. .."[10] Further, the FCC specifically stated that its order would not "...supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis...,"[11] but made no such finding regarding existing interconnection agreements. Consequently, in order to have any meaning, the TRRO's provisions regarding "new adds" must be effective March 11, 2005, without the necessity of formal amendment to any existing interconnection agreements. Therefore, while BellSouth will not breach its interconnection agreements, nor act unilaterally to modify its agreements, the FCC's actions clearly constitute a generic self-effectuating change for all interconnection agreements with regard to "new adds" for these former UNEs.

Thus, pursuant to the express terms of the TRRO, effective March 11, 2005, for "new adds," BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ("TELRIC") rates or unbundled network platform ("UNE-P") and as of that date, BellSouth will no longer accept orders that treat those items as UNEs.

Further, effective March 11, 2005, BellSouth is no longer required to provide high capacity UNE loops in certain central offices or to provide UNE transport between certain central offices. As of that date, BellSouth will no longer accept orders that treat these items as UNEs, except where such orders are certified pursuant to paragraph 234 of the TRRO. In addition, as of March 11, 2005 BellSouth is no longer required to provide new UNE dark fiber loops or UNE entrance facilities under any circumstances and we will not accept orders for these former UNEs.

Prior to the effective date of the TRRO, BellSouth will provide comprehensive information to CLECs regarding those central offices where UNE DS1 and DS3 loops are no longer available, and the routes between central offices where UNE DS1, DS3 and dark fiber transport are no longer available.

CLECs will continue to have several options involving switching, loops and transport available to serve their new customers. To this end, with regard to the combinations of switching and loops that constituted UNE-P, BellSouth is offering CLECs these options:

- Short Term (6 month) Commercial Agreement to provide a bridge between the effective date of the Order and the negotiation of a longer term commercial agreement,
- Long Term Commercial Agreement (3 years, effective January 1, 2005, with transitional discounts available under those agreements executed by March 10, 2005)

In addition, most CLECs, if not all, already have the option of ordering these former UNEs, and particularly the combination of loops and switching, as resale, pursuant to existing interconnection agreements.

To be clear, in the event one of the above options is not selected and a CLEC submits a request for new UNE-P on March 11, 2005 or after, the order will be returned to the CLEC for clarification and resubmission under one of the available options set forth above. CLECs that have already signed a Commercial Agreement may continue to request new service pursuant to their Commercial Agreement.

With regard to the former high capacity loop and transport UNEs, including dark fiber and entrance facilities, that BellSouth is no longer obligated to offer, BellSouth has two options for CLECs to consider. Specifically, CLECs may either elect to order resale of BellSouth's Private Line Services or alternatively, may request Special Access service in lieu of the former TELRIC-priced UNEs. Any orders submitted for new unbundled high capacity loops and unbundled dedicated interoffice transport

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[10] TRRO ¶235

[11] TRRO ¶199 Also see ¶ 198

in those non-impaired areas after March 11, 2005, without the required certifications, will be returned to the CLEC for clarification and resubmission under one of the above options.

To obtain more information about this notification, please contact your BellSouth contract negotiator.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused BellSouth Telecommunications, Inc.'s Letter of Submission in Docket No. 2004-316-C to be served upon the following this February 14, 2005:

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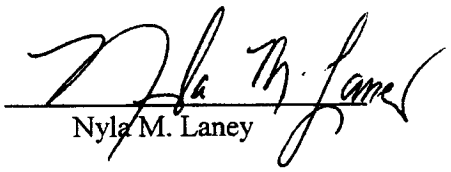
(US LEC of South Carolina)
(U. S. Mail and Electronic Mail)



Nyla M. Laney

PC Docs # 554784

EXHIBIT B

BellSouth Interconnection Services

675 West Peachtree Street, NE
Room 34S91
Atlanta, Georgia 30375

Jerry D. Hendrix
(404)-927-7503
Fax: (404) 529-7839

Sent Via E-mail and Certified Mail

February 25, 2005

Ms. Nanette Edwards
Director - Regulatory
ITC^DeltaCom
Suite 400, 7037 Old Madison Pike
Huntsville, Alabama 35806

Dear Ms. Edwards:

This is in response to your letter dated February 21, 2005, requesting assurances from BellSouth of its intent to comply with the terms of the existing Interconnection Agreements between BellSouth and ITC^DeltaCom Communications, Inc. ("DeltaCom") and Business Telecom, Inc. ("BTI") collectively DeltaCom/BTI[1] and to participate immediately in good-faith negotiations regarding the changes of law reflected in the Federal Communications Commission's (FCC) Triennial Review Remand Order (TRRO) that will become effective on March 11, 2005.

In accordance with the Parties' Interconnection Agreement, BellSouth welcomes the opportunity to negotiate amendments with all carriers to address changes of law including, but not limited to the recent transition period outlined in the TRRO, once it becomes effective on March 11, 2005. Although the terms of the Interconnection Agreements generally provide that we cannot issue change of law letters until the change of law becomes effective, BellSouth is certainly willing to meet with you or other CLECs at our earliest mutually convenient time to discuss the changes that need to be made to the Parties' Interconnection Agreements. As you note in your letter, BellSouth is currently preparing a proposed amendment incorporating the TRRO and will provide the proposed amendment to DeltaCom/BTI once it is completed. We hope to have the proposed amendment ready shortly. Parenthetically, I would also note that while we do not have a transcript that I am aware of from the conference call with the North Carolina Public Staff, which you do not identify, but which I believe to be the discussion that is the subject of your reference on page 4 of your letter, BellSouth did not make the statement that you attribute to Mr. Lackey. You and the other CLECs participating in the call were informed that BellSouth did not know when its amendment would be ready, not that it would not be ready before March 14, 2005. If you will look at the report that the North Carolina Public Staff sent to the North Carolina Utilities Commission (NCUC), March 14, 2005, was the proposed date for sending the change of law letters to CLECs, which is three days after we are legally permitted to provide notice under our interconnection agreement. This proposal seems entirely reasonable since March 11, 2005 is a Friday.

[1] ITC^DeltaCom has nine separate Agreements with BellSouth and BTI has one Agreement for all nine states. The Modification of Agreement Sections of the GTC's of these agreements varies regarding the provisions for the number of days for BellSouth to provide a proposed amendment from the initial request. In the ITC^DeltaCom Georgia Agreement, the provision is 30 calendar days from receipt of ITC^DeltaCom's initial request.

To avoid any confusion concerning DeltaCom/BTI's previous requests for negotiation dates from BellSouth outlined in Exhibit B attached to your letter, your December 20, 2004 e-mail asked for a time to negotiate changes based on the FCC's TRRO, before the TRRO was actually issued. You specifically asked for time during the week of January 11, 2005, and the TRRO was not released until February 4, 2005. Quite frankly, it is unclear how the parties would negotiate terms and conditions that had not yet been released, even if your request had not been premature on its face. With that said, BellSouth intends to negotiate a new agreement, as your letter requests and as the Interconnection Agreements allow, to include those recent changes in law, including but not limited to the TRRO, the Triennial Review Order (TRO) and the 252(i) Order[2]. Those changes in law, many of which were either affirmed by the D.C. Circuit or not appealed, have been in effect for more than one year, and BellSouth has been seeking for some time to make sure its Interconnection Agreements are consistent with those rules.

Turning to the more substantive parts of your letter, BellSouth disagrees with your statement "that if BellSouth undertakes the actions outlined in the carrier notice letter, then BellSouth is in breach of our existing interconnection agreements and in violation of the Order..." BellSouth will not breach its Interconnection Agreements, and BellSouth will not act unilaterally to modify its agreements. The FCC's actions in the TRRO clearly constitute a generic self-effectuating change for all Interconnection Agreements with regard to "new adds" for network elements that no longer must be unbundled pursuant to section 251 of the Act. BellSouth will, of course, negotiate all of the terms and conditions for changes that the FCC has required, although certain portions of the TRRO by their own terms have to be self-effectuating. Any suggestion that the FCC intended to allow carriers to add new UNE-P lines from March 11, 2005, until the time various interconnection agreements are actually amended would render meaningless the FCC's determination that there would be no "new adds" during the transition period.

In response to DeltaCom/BTI's discussion regarding high capacity loops and transport, BellSouth's Carrier Notification SN91085045, dated February 18, 2005, simply identifies for the benefit of the CLECs, the wire centers that satisfy the Tier 1, Tier 2, and Tier 3 criteria for dedicated transport and dark fiber transport as well as wire centers that satisfy the non-impairment thresholds for DS-1 and DS-3 loops. This Carrier Notification letter is in compliance with the TRRO and DeltaCom/BTI cannot ignore its message by hiding behind interconnection agreements that have been modified by the self-effectuating new rules discussed above that address the national public policy and the objectives of the Act. As the TRRO makes clear, it is for the FCC to determine where "no section 251(c) unbundling requirement exists," and thus, BellSouth's identification of these wire centers is clearly within the provisions of the Order to provide CLECs the necessary information to "undertake a reasonably diligent inquiry" prior to submitting an order. The Carrier Notification letter is in compliance with the TRRO and BellSouth will not accept orders from CLECs after March 11, 2005, that are not consistent with this list. Your comments about CLECs "self-certifying" their entitlement to various loop and transport UNEs overlooks the fact that DeltaCom is obligated, under the TRRO, to "undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of ....(your)...knowledge" that you are entitled to the UNEs your company is requesting. It is difficult to understand, in the face of BellSouth's filing with the FCC, how DeltaCom or any CLEC can claim that you have undertaken a reasonably diligent inquiry and self-certify that your company is entitled to certain UNEs in or between the offices BellSouth has identified.

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[2] FCC's Order released July 13, 2004 in Docket 01-338 ("Pick and Choose order")

DeltaCom has an obligation under the TRRO in this regard just as BellSouth does, and you cannot ignore the information that BellSouth has provided to the FCC.

If DeltaCom/BTI has any dispute about whether an ILEC has been relieved of its section 251(c) unbundling obligations in a particular wire center, it should raise that dispute with the FCC, as the extent of an ILEC's unbundling obligation must be decided by the FCC.

Please feel free to call me with any questions.

Sincerely,

Jerry Hendrix
Assistant Vice President, Interconnection Services

EXHIBIT C

R-1. DOCKET NO. 19341-U: **Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements**: Consideration of Staff's Recommendation regarding MCI's Motion for Emergency Relief Concerning UNE-P Orders. (Leon Bowles)

Summary of Staff Recommendation

1. Parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *Triennial Review Remand Order* ("TRRO").

2. Issues related to a possible true-up mechanism should be decided at a later time.

3. Issues related to BellSouth's obligations to continue to provide mass market unbundled local switching under either Georgia law or section 271 should be resolved by the Commission in the regular course of this docket.

Background

On February 21, 2005, MCI MetroAccess Transmission Services, LLC ("MCI") filed with the Georgia Public Service Commission ("Commission") a Motion for Emergency Relief Concerning UNE-P Orders ("Motion"). The Motion asked for the following relief:

(1) Order BellSouth to continue accepting and processing MCI's unbundled network platform ("UNE-P") orders under the rates, terms and conditions of the Agreement;

(2) Order BellSouth to comply with the change of law provisions of the Agreement with regard to the implementation of the TRRO;

(3) Order such further relief as the Commission deems just and appropriate.

BellSouth Telecommunications, Inc. filed its Response in Opposition ("Response") on February 23, 2005.

MCI's Motion was in response to Carrier Notification Letters received from BellSouth Telecommunications, Inc. ("BellSouth"). The Carrier Notification Letters, in turn, were in response to the February 4, 2005, Triennial Review Remand Order issued by the Federal Communications Commission ("FCC"). The FCC determined on a nationwide basis that incumbent local exchange carriers ("ILECs") are not obligated to provide unbundled local switching pursuant to section 251(c)(3) of the Federal Telecommunications Act ("Federal Act"). (TRRO ¶ 199). For the embedded customer base, the FCC adopted a twelve-month transition period, but specified that this transition period would not permit competitive LECs ("CLECs") to add new customers using unbundled access to local circuit switching. *Id.*

MCI Motion

MCI asserted that its interconnection agreement with BellSouth includes a provision that specifies the necessary steps to be taken in the event of a change in law. (Motion, p. 4). MCI

states that on February 8, 2005, and then on February 11, 2005, it received from BellSouth Carrier Notification Letters stating that as a result of the Triennial Review Remand Order ("TRRO") it was no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost rates or unbundled network platform and as of that date, BellSouth will no longer accept orders that treat those items as unbundled network elements. *Id.* at 7-8.

On February 18, 2005, MCI sent a letter to BellSouth asserting that the actions referenced in its Carrier Notification Letters would constitute breach of the parties' agreement. *Id.* at 8. Specifically, MCI claims that the actions would breach the agreement (i) by rejecting UNE-P orders that BellSouth is obligated by the Agreement to accept and process; and (ii) by refusing to comply with the change of law procedure established by the Agreement. *Id.* at 1. MCI argues that the TRRO does not purport to abrogate the parties' rights under their interconnection agreement. *Id.* at 6. Therefore, MCI contends that BellSouth is required to follow the steps set forth in the parties' interconnection agreement. *Id.* at 9. The change of law provision states that in the event that "any effective and applicable . . . regulatory . . . or other legal action materially affects any material terms of this Agreement . . . or imposes new or modified rights or obligations on the Parties . . . MCIm or BellSouth may, on thirty (30) days written notice . . . require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required." (Agreement, Part A, § 2.3.)

MCI also argues that BellSouth is obligated to provide UNE-P under state law. *Id.* at 10. Finally, MCI states that section 271 of the Federal Act independently supports MCI's right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the Agreement. *Id.* at 14.

BellSouth Response

BellSouth argues that the TRRO is self-effectuating, and that as of March 11, 2005 (effective date of TRRO), it does not have any obligation to provide unbundled mass market local switching. (Response, p. 3). BellSouth construes the TRRO to abrogate the change of law provisions of the parties' agreements. BellSouth argues that under the *Mobile-Sierra* doctrine the FCC has the authority to negate any contract terms of regulated carriers, under the condition that it makes adequate public findings of interest. *Id.* at 5.

BellSouth argues that MCI is not entitled to UNE-P under state law. First, BellSouth argues that the Commission has not held the necessary impairment proceedings. *Id.* at 8-9. Second, BellSouth argues the Commission is preempted from granting the relief sought by MCI on this issue. *Id. at* 9-11. Third, BellSouth states that state law does not provide for the combination of unbundled network elements. *Id.* at 11.

Finally, BellSouth rebuts MCI's section 271 arguments. BellSouth claims that although it is obligated to provide unbundled local switching under section 271, switching under this code section is not combined with a loop, is subject to exclusive FCC jurisdiction and is not provided via interconnection agreements. *Id.*

Staff Recommendation

1. Parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *Triennial Review Remand Order* ("TRRO").

At this time, there is no dispute between the parties as to the meaning or purpose of the change of law provision. The difference between the parties is over whether the TRRO alters the parties' rights under their interconnection agreement. That is, whether the TRRO should be construed to negate the change of law provision so that as of the effective date of the TRRO the parties rights under their agreement change. The first step in this analysis is to determine whether the FCC has the authority to issue an order that would alter the parties' rights under the interconnection agreements. If this question is answered in the affirmative, then the next question is whether the FCC exercised that authority in the TRRO with regard to the change of law provision.

BellSouth cites to the *Mobile-Sierra* doctrine in its Response. This doctrine allows for the modification to the terms of a contract upon a finding that such modification will serve the public need, and it has been held that the FCC has the authority to employ the doctrine. Cable & Wireless, P.L.C. v. FCC, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999). Therefore, it appears that the answer to the first question is that the FCC does have the authority under the proper circumstances to amend agreements between private parties.

In order to determine whether the FCC intended to employ the doctrine in this instance it is necessary to examine more closely what is required for its application. In a case involving the Federal Energy Regulatory Commission, the D.C. Circuit Court of Appeals held that it is a violation of the *Mobile-Sierra* doctrine for an agency to modify a contract without "making a particularized finding that the public interest requires modification . . ." Atlantic City Electric Company, et al. v. FERC, et al., 295 F.3d 1, 40-41 (2002). In Texaco Inc. and Texaco Gas Marketing Inc. v. FERC et al., 148 F.3d 1091 (1998), the Court of Appeals for the D.C. Circuit expanded on the high public interest standard necessary to invoke the *Mobile-Sierra* doctrine. The Court explained that the finding of public interest necessary to override the terms of a contract is "more exacting" than the public interest that FERC served when it promulgated its rules. 148 F.3d at 1097. The Court held that the public interest necessary to alter the terms of a private contract "is significantly more particularized and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract's deleterious effect." *Id.* Therefore, in order to determine whether the FCC intended to invoke the *Mobile-Sierra* doctrine, it is necessary to examine the analysis, if any, that the FCC conducted to decide whether modification of the agreements satisfied the public interest.

BellSouth's Response does not include a single reference to a statement in the TRRO that modification of the agreements was in the public interest, much less a citation to analysis of why such reformation would be in the public interest. In fact, BellSouth does not cite to any express language in the TRRO at all that says that the FCC intends to reform the contracts. Instead, BellSouth quotes the FCC's statement that the transition period "shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using

unbundled access to local circuit switching." (BellSouth Response, p. 4, quoting TRRO ¶ 199). BellSouth follows this quotation with the question, "How much clearer could the FCC be?" (Response, p. 4). The answer to this question is provided in the very order cited by BellSouth later in its brief for support that the FCC has the authority to invoke the *Mobile-Sierra* doctrine. In its *First Report and Order,* prior to addressing contracts between ILECs and commercial mobile radio service providers, the FCC explained the basis for its authority to modify contracts when such modifications served the public interest. BellSouth cites to no language in the TRRO even approaching that level of clarity.

Even if the strict standard did not apply, the TRRO could not be read to abrogate the rights of the parties related to the change in law provisions of their agreements. To the contrary, parties are directed to implement the rulings of the TRRO into their agreements through negotiation.

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

(*TRRO* § 233, footnotes omitted).

If the FCC had not intended for parties to negotiate amendments related to their interconnection agreements related to new customers, then it seems likely that it would have made that exception clear in the above paragraph.

To support its position, BellSouth first cites to a portion of the order that states the requirements of the TRRO shall take effect March 11, 2005. (BellSouth Response, p. 2, citing TRRO, ¶ 235). However, examination of that paragraph makes it clear that all the FCC is addressing is that the TRRO would be effective March 11, 2005, "rather than 30 days after publication in the Federal Register." (TRRO, ¶ 235). It is not reasonable to construe this language as indicative of intent to abrogate the parties' interconnection agreements. Next, BellSouth claims that the FCC expressly stated that the TRRO would not supersede "any alternative arrangements that carriers voluntarily have negotiated on a commercial basis . . ." (BellSouth Response, pp. 2-3, quoting TRRO ¶199). BellSouth reasons that the express exemption for commercial agreements must mean that the lack of exemption for conflicting provisions in interconnection agreements means they are superseded. (Response, p.3). The flaw in BellSouth's analysis is that it fails to characterize the TRRO correctly. The FCC did not state that the TRRO would not supersede the commercial agreements; it stated that the *transition period* would not supersede the commercial agreements. (TRRO, ¶ 199). Nothing about the

transition period has any bearing on the application of the change of law provision to the question of "new adds" after March 11. Consequently, supersession is not an issue between the transition period and this application of the change of law provision.

BellSouth also relies upon the use of the term "self-effectuating" in paragraph 3 of the TRRO. However, BellSouth does not characterize this paragraph accurately. BellSouth states that the use of the term "self-effectuating" refers only to "new adds." (Response, p. 2). That is not a distinction the FCC makes. The FCC simply states that the impairment framework is, *inter alia,* "self-effectuating." (TRRO, ¶3). BellSouth must acknowledge that for the embedded customer base subject to the transition period the order recognizes the need for negotiations to implement the provisions into interconnection agreements. Therefore, unless it can link the FCC's use of the term "self-effectuating" solely to the "new adds," its argument cannot prevail. It cannot do so convincingly; however, and its argument on this issue must fail.

Finally, the Staff's recommendation is consistent with the Commission's decision in Docket No. 14361-U related to the effective date of the rates in that proceeding. In its September 2, 2003 Order on Reconsideration, the Commission held that "the rates ordered in the Commission's June 24, 2003 Order are available to CLECs on June 24, 2003, *unless the interconnection agreement indicates that the parties intended otherwise.*" (Order on Reconsideration, p. 4) (emphasis added). That this ordering paragraph contemplated consideration of change of law provisions was demonstrated in Docket No. 17650-U, *Complaint of AT&T Communications of the Southern States, LLC of the Southern States, LLC Against BellSouth Telecommunications, Inc.* In its Order Adopting Hearing Officer's Initial Decision, the Commission concluded that the change of law provision in the parties' interconnection agreement applied, and justified an effective date other than June 24, 2003. In its brief in that docket, BellSouth, then in a position to benefit from the application of the change of law provision, stated that, "The change-in-law provision contains specific steps which the parties must follow to change the terms, when a regulatory action materially affects any material terms of the Agreement." (BellSouth Brief in Support of its Motion to Dismiss and Response to Complaint and Request for Expedited Review, p. 3). The Commission agreed with this argument raised by BellSouth in that docket. The Staff believes that it would be consistent to apply that reasoning in this instance as well.

2. Issues related to a possible true-up mechanism should be decided at a later time.

Staff recommends that the Commission defer ruling on the question of a true-up mechanism until after it has had the opportunity to consider the issues more closely. This matter is being brought before the Commission on an expedited basis. While it is necessary for the Commission to resolve the issue related to the change of law provisions prior to March 11, 2005, the same urgency does not apply to the issue of a true-up mechanism. Prior to voting on this issue, it may be of assistance for the Commission to confirm that it has the benefit of all the arguments related to the appropriateness and operation of a true-up mechanism as well as any other potential issues involved. Staff intends to bring this issue back before the Commission in a timely manner.

3. Issues related to BellSouth's obligations to continue to provide mass market unbundled local switching under either Georgia law or section 271 should be resolved by the Commission in the regular course of this docket.

The Order Initiating Docket set forth among the issues to be addressed: "whether BellSouth is obligated to provide Unbundled Network Elements ("UNEs") under section 271 of the Telecommunications Act of 1996," and "whether BellSouth is obligated to provide UNEs under Georgia State Law." Because those issues as well do not need to be decided prior to March 11, the Staff recommends that the Commission decide those issues in the regular course of this docket.